of whether job positions at KFUO are sufficiently religious that occurred here -- and which Justice Brennan predicted would *necessarily* occur from a partial exemption -- produces "excessive government entanglement." Amos, 483 U.S. at 343-44; see also NLRB v. Catholic Bishop of Chicago, 440 U.S. at 490, 502 (1979) (noting that process of resolving NLRB charges raised Establishment Clause concerns because it "necessarily involve[d] inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the . . . religious mission.").

Furthermore, the EEO reporting requirements imposed by the FCC will now force the Church to identify, explain and seek Government approval for every job function, or modification of such a function, that the Church believes warrants a religious exemption. This process of testing and evaluating religious matters in an effort to second-guess the Church's good faith judgments is precisely the sort of "protracted legal process [that] pit[s] church and state as adversary" that violates the Establishment Clause. Catholic University, 83 F.3d at 465, (quoting Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985) cert. denied, 478 U.S. 1020 (1986)); see also Little v. Wuerl, 929 F.2d at 948-49 (asserting that a prohibition against religious discrimination on a parish's employment action would be suspect under the Establishment Clause).

II. By Forbidding the Church to Use a Religious Criterion In Hiring Personnel for Certain Positions at the Radio Stations, the FCC Discriminates Against Religious Broadcasters In Violation of Both the Free Speech and Free Exercise Clauses of the First Amendment

It is well settled that a government action that discriminates on the basis of the speaker's viewpoint -- religious or otherwise -- is subject to the most exacting scrutiny under the First

Amendment. Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445, 2458-59, reh'g denied, 512 U.S. 1278 (1994) ("Turner"); see Rosenberger v. Rector and Visitors of Univ. of Virginia, 115 S.Ct. 2510 (1995) (religious speech); see also Smith, 494 U.S. 872 (religious speech). In its MO&O, the FCC has unlawfully discriminated against the Church as a speaker. The Church, as the owner and operator of KFUO, is a speaker with a unique viewpoint. For decades, it has sought, as an independent source of value-laden programming, to add to the diverse mix of programming choices serving the public. The FCC's ruling that the Church may not prefer recruits who have knowledge of Lutheran doctrine -- for example may not prefer an African American Lutheran over an African American non-Lutheran -- constitutes a form of viewpoint discrimination which is unconstitutional under both the Free Speech and Free Exercise Clauses of the First Amendment.[8]

It is undisputed that the EEO Rule, to the extent it reaches matters other than immutable characteristics such as race, prohibits discrimination only on the basis of "religion" and not on the basis of other viewpoints or categories of speech. 47 C.F.R. § 73.2080(a) (1996). Assuming no pretext for racial or other unlawful discrimination is involved, does the FCC intend to also second guess those stations which choose to hire from among their recruits personnel (e.g., a station manager, business manager or secretary) who are knowledgeable or even enthusiastic about sports, news or rock-and-roll? Would the FCC penalize a station that broadcasts political talk shows and prefers to hire applicants who have some kind of political knowledge or interest? In short, within the realm of viewpoint, belief, or ideology, the FCC has chosen to discriminate

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[8] King's Garden did not address this constitutional challenge to the FCC's EEO Rule and is therefore not controlling on the issues discussed here.

against only religious viewpoints, at least as to those positions at religious organizations that the Commission deems not reasonably connected with espousal of the Church's religious view over the air.

Because the FCC's EEO policy regulates broadcasters differently based on the nature of their viewpoint, the policy is a prime example of content-based regulation. As noted above, it is a staple feature of free speech jurisprudence that the government may not discriminate among speakers on the basis of the content of their speech, unless the government shows that the discrimination is the least restrictive means of fulfilling a compelling governmental interest. Turner, 114 S. Ct. at 2458-59 (1994); Sable Communications of California Inc. v. FCC, 492 U.S. 115, 126 (1989). The same rule applies, obviously, to discrimination against religious speech. Indeed, the Supreme Court has held that discrimination against religious speech in general is viewpoint discrimination, even if all religious views are treated the same. Rosenberger v. Rector and Visitors of Univ. of Virginia, 115 S.Ct. 2510 (1995); Lamb's Chapel v. Center Moriches Sch. Dist., 113 S. Ct. 2141 (1993). The FCC's discrimination in this case, therefore, is unquestionably subject to the compelling interest least restrictive alternative test. And for the reasons described in Section I, the FCC's MO&O cannot survive this strict scrutiny.

The discrimination against religious speech in the MO&O violates both the Free Exercise Clause and Establishment Clause of the First Amendment. Both of these Clauses subject any government discrimination against religion to the most exacting scrutiny. See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993) (Free Exercise Clause); Everson v. Board of Educ. of Ewing, 330 U.S. 1, 15-16, reh'g denied, 330 U.S. 855 (1947) (Establishment Clause). As noted, the FCC singles out religious broadcasters for

treatment that it does not impose upon broadcasters who do not identify with a particular religious faith. The FCC's MO&O thus discriminates against religion and must withstand strict scrutiny for this reason as well. By the same analysis as in Section I, it does not.

III. The FCC's Application of Its EEO Rule to The Church Violates the Equal Protection Clause of the Fifth Amendment

If it is the FCC's position that a religious exemption modeled on Section 702 is inconsistent with the premise of the Commission's EEO Rule, the FCC's application of its EEO Rule to the Church then violates the Equal Protection Clause of the Fifth Amendment. Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995) ("Adarand"). The Church and KFUO have demonstrated their commitment to nondiscrimination on the ground of race and gender. ID ¶¶ 36-37. The Church seeks members from all races and has its own affirmative action policy that applies to KFUO. ID ¶¶ 42-43. The Church believes that its own policies are not in any way inconsistent with the FCC's goal of ensuring "diversity" -- there are many African American Lutherans (ID ¶¶ 38), and the Church's efforts to enlist individuals with knowledge of Lutheran doctrine includes efforts to enlist Lutheran minorities. The FCC's MO&O seems to hold, however, that the Church's religious preferences are inconsistent with the FCC's affirmative action requirements under its EEO Rule. Under these circumstances, the Church believes that the Court should consider the legality of those requirements. The Church must reject any attempt by the Government to impose on it specific employment steps that are based on racial classifications insofar as those steps impede its ability to use religious preferences in hiring. Cf. Texas v. Johnson, 491 U.S. 397, 418 (1989) ("It is not the State's ends, but its means, to which we object.").

In Adarand, the Court held that under the Fifth Amendment the use of racial classifications by the federal government must meet strict scrutiny, i.e., such classifications must serve a compelling governmental interest and must be narrowly tailored to further that interest. The FCC's application of its EEO Rule to the Church is not justified under this standard, particularly when weighed against the Church's First Amendment right to prefer applicants with knowledge of Lutheran doctrine. In rejecting this challenge, the FCC claimed that its EEO Rule and the MO&O "do not use racial classifications," do not require that any person be hired or be given a racial preference, and therefore do not result in a deprivation of any constitutional right on the basis of race. MO&O ¶ 13. But the NAACP attacked the Church because its minority hiring was not at "parity" with the minority labor force (Pet. to Deny at 3) and the FCC required the Church to defend its record on the basis of this numerical showing.

Moreover, the FCC penalized the Church for failing to be race-conscious at *every step* in its hiring process for *every* vacancy during the period August 1987 through January 1990. ID ¶¶ 220-22. The Church was faulted because it preferred applicants with knowledge of Lutheran doctrine, and accordingly used Lutheran referral sources for applicants, rather than using referral sources that were "likely sources" of minorities. ID ¶¶ 200-01, 220. The Church was penalized because it failed to "self-assess" by keeping records of precisely how many minorities each referral source produced, how many minorities were in each applicant pool, how many minorities were interviewed for each job, and how many minorities were hired as well as for failing to compare the results of its analyses to the availability of minorities in the St. Louis MSA labor market. See Nondiscrimination Employment Practices of Broadcast Licensees, 13 F.C.C. 2d 766 (1968). It is difficult to imagine a decision that would require the Church to be *more* race

conscious at every step in its employment process. This is precisely the sort of use of racial classifications that the Supreme Court held in Adarand must be justified by a compelling state interest. The "central mandate" of the Equal Protection Clause is "racial neutrality in governmental decisionmaking." Miller v. Johnson, 115 S.Ct. 2475, 2482 (1995). "Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest." Id.

The FCC cannot show that there is a compelling state interest in refusing to allow the Church to prefer applicants with Lutheran knowledge and instead forcing the Church to be race conscious in all of its employment decisions. In these circumstances, the need to "promote programming diversity," does not constitute a compelling interest. See Hopwood v. State of Tex., 78 F.3d at 944-48. Moreover, for the reasons given above, the FCC's EEO requirements are not narrowly tailored to promote "program diversity." There is no reason that the EEO Rule could not be narrowly tailored to contain an exemption similar to Section 702 while still promoting "program diversity." The EEO Rule is also not narrowly tailored because it is not appropriately limited to last no longer than the supposed effects it is allegedly designed to eliminate. Adarand, 115 S.Ct. at 2117-18. In any case, the FCC has not shown that the EEO Rule, much less the Commission's refusal to exempt religious organizations from the prohibitions on religious discrimination, actually leads to "programming diversity." Certainly the FCC has never established that its ruling requiring the Church to be race conscious is justified when weighed against the Church's First Amendment right to use religious job preferences.

IV. The FCC Acted Arbitrarily and Capriciously, And Therefore Unlawfully, In Applying Its King's Garden Ruling to the Church Without Adequately Examining the Ruling's Underlying Premises

Between the early 1970's and the MO&O, the Commission never reexamined the premises of its 1972 letter ruling that only persons hired to espouse a particular religious philosophy over the air should be exempt from the religious nondiscrimination rules. See Discriminatory Employment Practices by King's Garden, Inc., 34 F.C.C. 2d at 938. In the MO&O, the Commission reaffirmed its King's Garden "policy" based on a naked allegation -- without any evidentiary showing or support -- that its refusal to exempt religious organizations from the prohibitions on religious discrimination fostered "diversity of programming." MO&O ¶ 14.

The FCC does not, however, have an "undifferentiated mandate to enforce the antidiscrimination laws." Bilingual Bicultural Coalition of Mass Media, Inc. v. FCC, 595 F.2d 621, 628 (D.C. Cir. 1978). Rather, in the Commission's own view, its role is confined to regulating employment practices only "to the extent those practices affect the obligation of the licensee to provide programming that 'fairly reflects the tastes and the viewpoints of minority groups' and to the extent those practices raise questions about the character qualifications of the licensee." Id. (quoting National Org. for Women v. FCC, 555 F.2d 1002, 1017 (D.C. Cir. 1977)) (citations omitted). The FCC has never established an evidentiary record that shows that its interference with the associational and religious educational liberties of religious organizations through its King's Garden ruling somehow leads to "programming diversity." This sort of adherence to an old ruling without any showing by the Commission that the premises of that ruling are still valid is precisely the practice that this Court rejected as arbitrary and capricious in

Bechtel II. and which the Court should reject again here. Because policy statements are exempt from the Administrative Procedure Act's notice-and-comment requirements (5 U.S.C. § 553(b) (1994)), "the agency must always stand ready 'to hear new argument' and to 'reexamine the basic propositions' undergirding the policy." Bechtel II, 10 F.3d at 873.

The Commission's continued use of the King's Garden case to circumscribe the rights of religious broadcasters cannot be reconciled with important changes in the law, and the Commission has long been duty-bound to reexamine the foundation for its ruling in King's Garden. Since 1972, the King's Garden ruling has been in tension, to say the least, with the Congressional policy set forth in Section 702 of Title VII, which permits religious entities to use religious knowledge as a qualification for all their activities. Even assuming that the Commission believed it was justified in not reviewing King's Garden in the early 1970's, it was incumbent upon the Commission to review King's Garden in light of the Supreme Court decision in Amos, which definitively held that Section 702 was constitutional. Indeed, as shown in Section I, supra, both the opinion for the Court and Justice Brennan's concurrence in Amos predicted that a case-by-case religious exemption would cause precisely the sorts of interference with religious practice and entanglement with religion that were graphically evidenced in this case. Yet the FCC for unexplained reasons never reevaluated its rule in the light of Amos. Its failure to do so requires reversal of the MO&O. See Bechtel II, 10 F.3d at 886-87.

V. The FCC Acted Arbitrarily and Capriciously, And Thus Unlawfully, In Concluding that the Church Lacked Candor Based on a Legal Argument of Its Counsel

The Commission's conclusion that the Church "lacked candor" is both false and arbitrary and capricious. It cannot be sustained. This ruling and the consequent imposition of a $25,000 forfeiture stems from former counsel's argument in predesignation pleadings that knowledge of classical music was a "requirement" for the position of salesperson at KFUO-FM. ID ¶¶ 154-155. According to the ALJ, the Church "preferred" or had a "preference" rather than a "requirement" for such knowledge and should have said so. ID ¶ 251.

There was no motive to use the word "required" rather than "preferred" in order to make the argument. The lawyer who framed the Church's argument, Marcia Cranberg of Arnold & Porter, testified that she still believed the argument she had made was "legitimate," even if the Church did not have an absolute requirement for classical music knowledge. ID ¶ 161. Commission precedent holds that this makes it "highly unlikely" that a licensee has an intent to deceive. Fox Television, 10 FCC Rcd at 8489-90, (affirming finding of lack of motive). It is crucial that, under well established Commission case precedent, the *sine qua non* of lack of candor is fraudulent intent. Abacus Broadcasting Corp. 8 FCC Rcd 5110, 5112 (Rev. Bd. 1993). see also Character Policy Statement, 102 F.C.C. 2d 1179, 1196 (1986) (subsequent history omitted); Fox River Broadcasting, Inc., 93 F.C.C. 2d 127, 129 (1983). The Judge concluded that all of the Church officials who appeared at the hearing testified truthfully. ID ¶ 259. The Church had no intent to deceive and the Commission's judgment to the contrary is arbitrary, capricious and at odds with both agency and judicial precedent. See WHW Enterprises, Inc. v. FCC, 753 F.2d 1132 (D.C. Cir. 1985) (reversing FCC conclusion concerning candor).

As mentioned above, Ms. Cranberg testified during the hearing. The Judge accepted her testimony that in drafting the pleadings, "she used as synonyms the terms 'knowledge of classical music,' 'classical music training,' 'expertise in classical music,' and a 'working knowledge of classical music,'" and that "all of the terms meant that persons hired for the relevant positions had to have a fairly significant knowledge of classical music." The Judge also found that counsel had testified that the statement that "knowledge of classical music was a 'requirement' was probably an overstatement;" she "wish[ed]" she had used another word;" and she stated she had not intended to mislead the Commission by using the word "requirement." Counsel testified that she was using a method of analysis that she believed the FCC had specifically endorsed in an earlier ruling, and it was a method that Arnold & Porter had previously used before the Commission on behalf of another classical music station in Philadelphia. ID ¶¶ 155-159. Moreover, the Judge found that the Church's Operations Manager, Dennis Stortz, testified that "the need for classical music knowledge for various positions, including salespersons, did not in any way affect the Stations' willingness to recruit individuals of any race" and "no minority applicant was ever rejected for any position at KFUO-FM because he or she lacked knowledge of classical music." ID ¶ 149. As noted above, the Judge concluded that all of the Church officials who appeared at the hearing, including Mr. Stortz, testified truthfully. ID ¶ 259.

The Commission's Review Board was correct when it declined to accept the ALJ's conclusion that the use of the word "required" rather than "preferred" in an argument by counsel constituted a "lack of candor." Citing Fox Television, the Review Board determined that "the critical word was embedded in and essential to a pre-conceived legal argument contrived by

counsel." and a layman might not fully appreciate the significance of the use of the term "requirement" as opposed to the term "preferred." Rev. Bd. Dec. ¶ 27. Indeed, it is not just a "layman" who might fail to appreciate the "significance" -- the Arnold & Porter lawyer who made the argument, hardly a layperson, testified that she believed the argument remained legitimate. ID ¶ 161.

The terminology in pleadings prepared by counsel did not evidence a lack of candor. The Church "was only submitting an explanation to meet the inference of discrimination that petitioners sought to draw from the statistics." Florida State Conference of Branches of the NAACP v. FCC, 24 F.3d 271, 274 (D.C. Cir. 1994) (citation omitted) ("Florida"). The word "preferred" could have been used to effectively make the same argument as the Church's counsel formulated using the word "required." ID ¶ 161. As in Florida, there was no evidence of intentional discrimination by the Church, yet in contrast to Florida, the Commission commenced an evidentiary hearing against the Church.

The Commission's conclusion and associated forfeiture cannot be reconciled with its decisions in other cases. The Church did not know that the argument of counsel could have been viewed as lacking candor. In Fox Television, the Commission refused to conclude that Fox misrepresented facts or lacked candor concerning the extent of its alien ownership where Fox had relied on counsel, stating: "We do not think it appropriate to find a lack of candor where a licensee has not second guessed its own attorneys, as long as the advice rendered appears reasonable and is relied on in good faith. We do not wish to create an environment in which licensees are discouraged from seeking and following the advice of legal counsel." Fox Television, 10 FCC Rcd at 8501 n.68. See also Roy M. Speer, 3 CR 363, 382 (1996) (Silver

King's characterizations of its activities did not raise an inference of misrepresentation or lack of candor). Both Fox Television and Speer involved sophisticated, large group owners of broadcast stations and the Commission resolved allegations of misrepresentation/lack of candor without even designating hearings. The Commission cannot distinguish the Church's statements from those in Fox Television and Speer, and its ruling of "lack of candor" by the Church must therefore be reversed as arbitrary and capricious. See Melody Music, Inc. v. FCC, 345 F.2d 730 (D.C. Cir. 1965) (similarly situated applicants must be treated similarly).

The Commission has certainly not pointed to any case justifying a finding of "lack of candor" or a $25,000 forfeiture based on a quibble about the use of one word rather than another in an argument advanced by counsel. The Church did not have any intent to deceive for the reasons stated by the Commission's Review Board. Accordingly, the FCC's lack of candor ruling must be reversed and the forfeiture vacated.

RELIEF SOUGHT AND CONCLUSION

For all the above reasons, the Court is respectfully requested to:

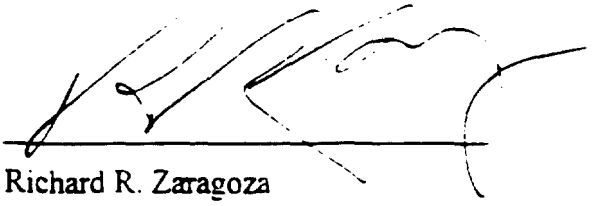
1. Hold that the FCC's application of its ruling in King's Garden to the Church violated the Constitution and RFRA, and reverse and vacate the FCC's ruling that the Church acted unlawfully in preferring applicants for employment on religious grounds;

2. Reverse and vacate the FCC's ruling that the Church's minority recruitment efforts for the period from August 3, 1987 through January 31, 1990 violated the FCC's EEO Rule;

3. Reverse and vacate the EEO reporting requirements imposed by the FCC; and

4. Reverse and vacate the FCC's ruling that the Church lacked candor when its counsel used the word "required" rather than "preferred" in a legal argument generated by counsel and the associated $25,000 forfeiture assessed against the Church.

Respectfully submitted,

By: 

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STATUTORY ADDENDUM

U.S. Constitution

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Article I, Section 8, Clause 18

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

CHAPTER 21B—RELIGIOUS FREEDOM RESTORATION

Sec.

2000bb. Congressional findings and declaration of purposes.
(a) Findings.
(b) Purposes.
2000bb-1. Free exercise of religion protected.
(a) In general.
(b) Exception.
(c) Judicial relief.
2000bb-2. Definitions.
2000bb-3. Applicability.
(a) In general.
(b) Rule of construction.
(c) Religious belief unaffected.
2000bb-4. Establishment clause unaffected.

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in section 1988 of this title; title 5 section 504.

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution.

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

(Pub. L. 103-141, § 2, Nov. 16, 1993, 107 Stat. 1488.)

REFERENCES IN TEXT

This chapter, referred to in subsec. (b), was in the original "this Act", meaning Pub. L. 103-141, Nov. 16, 1993, 107 Stat. 1488, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note below and Tables.

SHORT TITLE

Section 1 of Pub. L. 103-141 provided that: "This Act [enacting this chapter and amending section 1988 of this title and section 504 of Title 5, Government Organization and Employees] may be cited as the 'Religious Freedom Restoration Act of 1993'."

§ 2000bb–1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(Pub. L. 103-141, § 3, Nov. 16, 1993, 107 Stat. 1488.)

§ 2000bb–2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

(Pub. L. 103-141, § 5, Nov. 16, 1993, 107 Stat. 1489.)

§ 2000bb–3. Applicability

(a) In general

This chapter applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(Pub. L. 103-141, § 6, Nov. 16, 1993, 107 Stat. 1489.)

§ 2000bb–4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(Pub. L. 103-141, § 7, Nov. 16, 1993, 107 Stat. 1489.)

§ 2000e-1. Applicability to foreign and religious employment

(a) Inapplicability of subchapter to certain aliens and employees of religious entities

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(b) Compliance with statute as violative of foreign law

It shall not be unlawful under section 2000e-2 or 2000e-3 of this title for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

(c) Control of corporation incorporated in foreign country

(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 2000e-2 or 2000e-3 of this title engaged in by such corporation shall be presumed to be engaged in by such employer.

(2) Sections 2000e-2 and 2000e-3 of this title shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

(A) the interrelation of operations,

(B) the common management,

(C) the centralized control of labor relations, and

(D) the common ownership or financial control,

of the employer and the corporation.

(As amended Pub. L. 102-166, title I, § 109(b)(1), Nov. 21, 1991, 105 Stat. 1077.)

AMENDMENTS

1991—Pub. L. 102-166 designated existing provisions as subsec. (a) and added subsecs. (b) and (c).

EFFECTIVE DATE OF 1991 AMENDMENT

Amendment by Pub. L. 102-166 inapplicable to conduct occurring before Nov. 21, 1991, see section 109(c) of Pub. L. 102-166, set out as a note under section 2000e of this title.

§ 73.2080 Equal employment opportunities.

(a) *General EEO policy.* Equal opportunity in employment shall be afforded by all licensees or permittees of commercially or noncommercially operated AM, FM, TV, or international broadcast stations (as defined in this part) to all qualified persons, and no person shall be discriminated against in employment by such stations because of race, color, religion, national origin, or sex.

(b) *EEO program.* Each broadcast station shall establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice. Under the terms of its program, a station shall:

(1) Define the responsibility of each level of management to ensure a positive application and vigorous enforcement of its policy of equal opportunity, and establish a procedure to review and control managerial and supervisory performance;

(2) Inform its employees and recognized employee organizations of the positive equal employment opportunity policy and program and enlist their cooperation;

(3) Communicate its equal employment opportunity policy and program and its employment needs to sources of qualified applicants without regard to race, color, religion, national origin, or sex, and solicit their recruitment assistance on a continuing basis;

(4) Conduct a continuing program to exclude all unlawful forms of prejudice or discrimination based upon race, color, religion, national origin, or sex from its personnel policies and practices and working conditions; and

(5) Conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design, and other measures needed to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility.

(c) *EEO program requirements.* A broadcast station's equal employment opportunity program should reasonably address itself to the specific areas set forth below, to the extent possible, and to the extent that they are appropriate in terms of the station's size, location, etc.:

(1) Disseminate its equal opportunity program to job applicants and employees. For example, this requirement may be met by:

(i) Posting notices in the station's office and other places of employment, informing employees, and applicants for employment, of their equal employment opportunity rights. Where it is appropriate, such equal employment opportunity notices should be posted in languages other than English;

(ii) Placing a notice in bold type on the employment application informing prospective employees that discrimination because of race, color, religion, national origin, or sex is prohibited;

(iii) Seeking the cooperation of labor unions, if represented at the station, in the implementation of its EEO program and the inclusion of non-discrimination provisions in union contracts;

(iv) Utilizing media for recruitment purposes in a manner that will contain no indication, either explicit or implicit, of a preference for one sex over another and that can be reasonably expected to reach minorities and women.

(2) Use minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants, to supply referrals whenever

job vacancies are available in its operation. For example, this requirement may be met by:

(i) Placing employment advertisements in media that have significant circulation among minorities residing and/or working in the recruiting area;

(ii) Recruiting through schools and colleges, including those located in the station's local area, with significant minority-group enrollments;

(iii) Contacting, both orally and in writing, minority and human relations organizations, leaders, and spokesmen and spokeswomen to encourage referral of qualified minority or female applicants;

(iv) Encouraging current employees to refer minority or female applicants;

(v) Making known to recruitment sources in the employer's immediate area that qualified minority members and females are being sought for consideration whenever you hire and that all candidates will be considered on a nondiscriminatory basis.

(3) Evaluate its employment profile and job turnover against the availability of minorities and women in its recruitment area. For example, this requirement may be met by:

(i) Comparing the composition of the relevant labor area with composition of the station's workforce;

(ii) Where there is underrepresentation of either minorities and/or women, examining the company's personnel policies and practices to assure that they do not inadvertently screen out any group and take appropriate action where necessary. Data on representation of minorities and women in the available labor force are generally available on a metropolitan statistical area (MSA) or county basis.

(4) Undertake to offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility. For example, this requirement may be met by:

(i) Instructing those who make decisions on placement and promotion that qualified minority employees and females are to be considered without discrimination, and that job areas in which there is little or no minority or female representation should be reviewed;

(ii) Giving qualified minority and female employees equal opportunity for positions which lead to higher positions. Inquiring as to the interest and skills of all lower paid employees with respect to any of the higher paid positions.

(5) Analyse its efforts to recruit, hire, and promote minorities and women and address any difficulties encountered in implementing its equal employment opportunity program. For example, this requirement may be met by:

(i) Avoiding use of selection techniques or tests that have the effect of discriminating against qualified minority groups or females;

(ii) Reviewing seniority practices to ensure that such practices are nondiscriminatory;

(iii) Examining rates of pay and fringe benefits for employees having the same duties, and eliminating any inequities based upon race or sex discrimination.

(d) *Mid-term review for television broadcast stations.* The Commission will conduct a mid-term review of the employment practices of each broadcast television station at two and one half years following the station's most recent license expiration date as specified in §73.1020. The Commission will use the employment profile information provided on the first two Form 395-B reports submitted following such license expiration date to determine whether television station's employment profiles as compared to the applicable labor force data, are in compliance with the Commission's processing criteria. Television broadcast stations which employment profiles fall below the processing criteria will receive a letter noting any necessary improvements identified as a result of the review.

[52 FR 26884, July 16, 1987, as amended at 58 FR 42249, Aug. 9, 1993]

CERTIFICATION OF COUNSEL

Pursuant to Circuit Rule 28 (d) (1). the undersigned counsel hereby certifies that the Brief of Appellant Lutheran Church-Missouri Synod in Case No. 97-1116 contains no more than the number of words allowed by the Court's rules for an appellant's brief, i.e., 12.500 words. For purposes of this certification. counsel has relied on a word count reported by his word processing system. in which footnotes and citations are included as part of the word count.

Barry H. Gottfried

CERTIFICATE OF SERVICE

I. Barry H. Gottfried. a member of the Bar of this Court. do hereby certify that true and correct copies of the foregoing Brief for Petitioner. The Lutheran Church - Missouri Synod were served on this 8th day of September. 1997. upon the following via first class. postage prepaid U.S. mail:

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I, Cynthia L. Tucker, a secretary for the firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that I have on this 19th day of September 1997, served the foregoing **"Motion for Stay of EEO Reporting Requirement"** to the following:

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